

## Brigham Young University Law School BYU Law Digital Commons

---

### Utah Supreme Court Briefs

---

2001

# General Insurance Company of America v. Carnicero Dynasty Corporation, Wendell L. Butcher; Irene B. Butcher; Christ L. Stanfield; Janis B. Stanfield; Ben D. Issac; and Lila O Issac : Reply Brief

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc2](https://digitalcommons.law.byu.edu/byu_sc2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Ronald C. Barker; Attorney for Defendant and Appellants.

Wallace R. Lauchnor; Bayle and Lauchnor; Attorneys for Plaintiff and Respondent.

---

### Recommended Citation

Reply Brief, *General Insurance Company of America v. Carnicero Dynasty Corporation*, No. 13836.00 (Utah Supreme Court, 2001).  
[https://digitalcommons.law.byu.edu/byu\\_sc2/998](https://digitalcommons.law.byu.edu/byu_sc2/998)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

DOCUMENT

UTAH SUPREME COURT

BRIEF

RECEIVED  
LAW LIBRARY

CKET NO. **13836 AR**

1976

IN THE SUPREME COURT  
OF THE STATE OF UTAH

BYRON J. YOUNG UNIVERSITY  
J. REUBEN CLARK LAW SCHOOL

GENERAL INSURANCE  
COMPANY OF AMERICA,  
a corporation,

*Plaintiff-Respondent,*

vs.

CARNICERO DYNASTY  
CORPORATION, a corporation;  
WENDELL L. BUTCHER; IRENE  
B. BUTCHER; CHRIST L.  
STANFIELD; JANIS B.  
STANFIELD; BEN D. ISSAC;  
and LILA O. ISSAC,

*Defendants-Appellants.*

Case No.

13836

APPELLANTS' RELIEF BRIEF

Appeal from judgment against alleged indemnitors  
of bonding company on construction bond,  
District Court of Salt Lake County, State of Utah  
Honorable Bryant H. Croft, *Judge*

RONALD C. BARKER  
2870 South State Street  
Salt Lake City, Utah 84115  
Telephone 486-9636  
*Attorney for*  
*Defendants-Appellants*

WALLACE R. LAUCHNOR  
Bayle and Lauchnor  
1105 Continental Bank Building  
Salt Lake City, Utah 84101  
Telephone 364-3627

*Attorneys for Plaintiff-Respondent.*

FILED

## TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF THE KIND OF CASE .....	1
DISPOSITION IN LOWER COURT .....	1
RELIEF SOUGHT ON APPEAL .....	2
STATEMENT OF FACTS .....	2
ARGUMENT .....	8
POINT I	
BUTCHERS ARE NOT LEGALLY BOUND TO INDEMNIFY PLAINTIFF .....	8
POINT II	
BUTCHERS FAILURE TO RAISE DEFENSE OF LACK OF CONSIDERATION IN THEIR ANSWER DOES NOT PRECLUDE THEM FROM ASSERTING THAT DEFENSE AT THE TRIAL AFTER PLAINTIFF ITSELF INTRODUCED EVIDENCE WHICH MADE BUTCHERS' COUNSEL AWARE OF THAT DEFENSE .....	9
CONCLUSION .....	13

## RULES CITED

8(c) .....	10
15(b), URCP .....	11, 13
41(b) .....	10

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

GENERAL INSURANCE  
COMPANY OF AMERICA,  
a corporation,

*Plaintiff-Respondent,*

vs.

CARNICERO DYNASTY  
CORPORATION, a corporation;  
WENDELL L. BUTCHER; IRENE  
B. BUTCHER; CHRIST L.  
STANFIELD; JANIS B.  
STANFIELD; BEN D. ISSAC;  
and LILA O. ISSAC,

*Defendants-Appellants.*

Case No.

13836

---

## APPELLANTS' RELIEF BRIEF

---

### STATEMENT OF THE KIND OF CASE

Suite by bonding company against alleged indemnitors who signed indemnity agreement after bond had been issued.

### DISPOSITION IN LOWER COURT

District Court refused to dismiss for failure to prove enforceable agreement or to permit amendment to conform to evidence re absence of consideration and awarded judgment against alleged indemnitors for \$44,600.00.

## RELIEF SOUGHT ON APPEAL

Order reversing judgment and dismissing case as to defendants Butcher, or in the alternative, remanding the case for a new trial.

## STATEMENT OF FACTS

Butchers incorporate herein by reference the statement of facts found on pages 2 thru 5 of their original brief.

This reply brief is filed to correct grossly misleading statements of alleged facts contained in plaintiff's brief.

Among other things, *plaintiff would mislead the Court into believing:*

1. *That plaintiff requested an indemnity agreement from Butchers before it issued the bond to Carnicero.* (Plaintiff's brief pages 3-6, 9, 11, 17-21).

In fact Mills was not requested to obtain an indemnity agreement from Butcher until four months after the bond had been issued to Carnicero. (Bond issued Jan 6, 1969 — exhibit 3-P and he did not ask Butchers to sign the indemnity agreement until May 7, 1969 — exhibit 1-P). (R. 302-303; 375-380; 385-387)

2. *That the bond was issued to Carnicero in consideration of an alleged agreement by Butchers to sign*

*an indemnity agreement.* (Plaintiff's brief pages 3-6, 10-13, 17-21)

The indemnity agreement required by plaintiff (Exhibit 2-P) was typed in plaintiff's Denver office, and included the typed names of the persons who were to sign that indemnity agreement. (R. 375-380; 382; 384-387).

The Court summarized the testimony of plaintiff's agent Mills (R. 375-376) as follows:

“THE COURT: Why did you wait until May to ask Mr. Butcher to sign the Indemnity Agreement.

THE WITNESS (Mills): You will have to ask the company that because I do what the company ask me in regard to those items.

THE COURT: So from that, I take it, you went out and got his signature (Butcher's) on that Indemnity agreement in May of 1969 because you were instructed to do so by your company?

THE WITNESS: Yes, sir. Yes, sir.”

At the conclusion of the trial the Court in summarizing the evidence concerning the Butchers' indemnity agreement stated as follows (R. 417):

*“ . . . More than four months after the bond is issued, . . . the insurance company as an obvious afterthought, goes out through their agent Mills, and he gets the signature of Mr. and Mrs. Butcher on . . . an Indemnity Agreement. . . . ”*

It is clear from the foregoing that the bond was not in fact issued in consideration of an agreement by But-

chers to sign an indemnity agreement as claimed by plaintiff.

3. *That the tardiness of plaintiff's agent Mills in obtaining the signatures of Butchers was the reason that the Butcher indemnity agreement was signed after plaintiff issued it's bond to Carnicero.* (Plaintiff's brief page 18).

In fact Mills testified (as indicated in par #2 above) that plaintiff's Denver office determined who was to sign the indemnity agreements and that he simply did what he was told and obtained signatures of the persons named by the Denver office. (R. 377-380; 382, 385-387). He also testified that he was not requested to obtain the signatures of Butchers on an indemnity agreement until about four months after the bonds had been issued; that he promptly obtained those signatures and returned the Butcher indemnity agreements to the Denver office of plaintiff. (R. 375-377, 417) There is absolutely no evidence in the record which even suggests that Mills was tardy in obtaining signatures, or that the signatures of Butchers were requested on a date earlier than the date upon which they were obtained.

4. *That the Court allegedly weighed conflicting testimony and allegedly chose to believe the alleged testimony of Mills that the indemnification agreement from Butchers was requested and promised prior to the issuance of the bonds.* (Plaintiff's brief pages 13 and 19).

As illustrated under paragraphs #2 and #3 above, the

court did not weigh conflicting testimony as to the time when the Butcher indemnity agreement was first requested, but concluded in it's summarization of evidence at the conclusion of the trial (quoted in paragraph #2 above) (R. 417) that there was no promise by Butchers to sign an indemnity agreement prior to the issuance of the bonds. Also in its memorandum decision (denying Butchers' motions to dismiss or to amend to conform to the evidence) the Court (R. 147-149) did not find that Butchers had promised to sign the indemnity agreement prior to issuance of the bonds (as claimed by plaintiff in it's brief). The Court's decision is based entirely upon the failure of Butchers to plead lack of consideration in their answer, and upon Butchers failure to amend their answer to assert that defense during the four months between the time when plaintiff furnished information in answer to interrogatories (from which the availability of that defense could have been determined had counsel for Butchers been more astute), and the trial (R. 148-149). See Butchers original brief for discussion of error in that court decision.

*5. That the testimony quoted on pages 3-5 of plaintiff's brief supports plaintiff's unfounded claim that Butchers personally agreed to sign an indemnity agreement prior to issuance of the bonds.*

Mills testimony, quoted in plaintiff's brief, relates to Mills obtaining indemnity agreements before the bonds were issued. Mills there testified that he requested the indemnity agreement (from Stanfields and Isaacs) thru



Butcher prior to issuing the bonds. It is not disputed that the request for indemnity agreements were made through Butcher since he was the only person from Carnicero with whom Mills dealt (R. 370), however, the request was for an indemnity agreement from the Stanfields (Butchers daughter and son-in-law) and Isaacs (who were wholly unrelated to Butcher, contrary to the claims of plaintiff on page 3 of brief), but no request for an indemnity agreement was made of Butchers before the bonds were issued. It is interesting to note that immediately following the language quoted by plaintiff on page 4 of it's brief and relied upon by plaintiff to support its claims, that the Court asked the questions and received the answers quoted in paragraph #2 above (Page 3) to the effect that the sole reason Mills obtained the signatures of Butchers in May, 1969, was because it was requested at that time by plaintiff, which wholly refutes plaintiff's claim that the language quoted on page 4 of plaintiff's brief tends to prove an earlier agreement by Butchers to sign an indemnity agreement.

The Butcher testimony, quoted on page 5 of plaintiff's brief, apparently relies upon the use of the word "we" by Butcher when discussing plaintiff's requirement that indemnity agreements be obtained. The quoted testimony does not state that Butchers agreed to sign an indemnity or explain who is meant by the word "we." Butcher expressly stated in his testimony that when he

said "we" he was referring to Carnicero. (R. 299). Since plaintiff has obviously selected the testimony most favorable to its claim that Butchers agreed to sign an indemnity agreement to induce plaintiff to furnish a bond to Carnicero, and since the testimony selected by plaintiff does not establish such an agreement, it is clear that Butchers did not make such agreement.

6. *That about four months after the bonds had been delivered, plaintiff ". . . insisted that Mr. and Mrs. Butcher complete their agreement by signing the indemnification and returning it to the company."* (Plaintiff's brief page 12).

The above-quoted gratuitous statement is not referenced to any testimony or evidence in the record and in fact is not supported by the record. As demonstrated above (see paragraphs #2 and 3 above and the testimony of Mills there quoted) no such agreement was ever made by Butchers and no claim was ever made at the trial that Butchers were completing a prior agreement when they signed the indemnity agreement.

As indicated above, the undisputed testimony is that some four months after the bonds were delivered, as an obvious afterthought, plaintiff requested and received an indemnity agreement from Butchers (without giving consideration therefore). (R.302-303; 376-379; 386-387; 417).

## ARGUMENT

## POINT I

BUTCHERS ARE NOT LEGALLY BOUND TO IN-  
DEMNIFY PLAINTIFF

Plaintiff apparently agrees with the legal arguments presented in Butchers' original brief since they have not responded thereto, except to claim that those legal principles are inapplicable because of plaintiff's unfounded claim that the bond was issued in consideration of an earlier promise by Butchers to sign an indemnity agreement, (Point I of plaintiff's brief), and to claim prejudice in responding to Butchers' defense of lack of consideration (Point II of plaintiff's brief).

Plaintiff's brief acknowledges, in effect, that the Butcher indemnity agreement is unenforceable unless the bond was issued for Carnicero by plaintiff in reliance upon an agreement by Butchers to later sign such an indemnity agreement, and is directed primarily at establishing that the indemnity agreement need not be signed *before* the bond is issued if the signer signs in pursuance of his own previous promise to do so. (Plaintiff brief P. 15). We agree with that legal proposition, however it has no application to the facts in this case since (contrary to plaintiff's assertions in it's brief) Butchers were not requested to sign an indemnity agreement and did not promise to do so prior to issuance of the bond by plaintiff. See discussion under "Statement of Facts on pages 2 thru 7 of this brief.

Very simply stated then, the sole issue to be deter-

mined by the Court under plaintiff's point I is whether or not the evidence, when construed in the light most favorable to the judgment, would justify a finding that plaintiff issued its bond in reliance upon a promise by Butchers to execute an indemnity agreement. The Court found that the evidence did not support such a finding (R. 375-376; 417; 147-149). Also see discussion under "Statement of Facts."

Further, it is nowhere asserted in plaintiff's brief (or in the court record) that Mrs. Butcher promised to execute an indemnity agreement to induce the issuance of a bond. On the contrary, Mills testified that Wendell Butcher was the only person with whom he dealt concerning the indemnity agreements. (R. 370). In its brief plaintiff very cavalierly treats both Mr. and Mrs. Butcher as if they were a single person. Even if Wendell Butcher were liable under the indemnity agreement (which we deny), no facts have been alleged or proven which would impose liability upon Mrs. Butcher.

## POINT II

BUTCHERS FAILURE TO RAISE DEFENSE OF  
LACK OF CONSIDERATION IN THEIR ANSWER  
DOES NOT PRECLUDE THEM FROM ASSERTING  
THAT DEFENSE AT THE TRIAL AFTER PLAIN-  
TIF ITSELF INTRODUCED EVIDENCE WHICH  
MADE BUCHERS' COUNSEL AWARE OF THAT  
DEFENSE

Much of the argument under point II of plaintiff's brief is a rehash of plaintiff's unfounded assertion that the bond was issued in reliance upon an alleged agree-

ment by Butchers to sign an indemnity agreement. See discussion under statement of facts and point I above.

In summary, plaintiff's second point asserts:

1. *That lack of consideration is an affirmative defense that must be pleaded*, citing rule 8 (c), URCP, Plaintiff has confused failure of consideration (which is defense to previously enforceable contract, and must be pleaded under rule 8 (c) URCP), with lack of consideration (where no valid contract ever existed and which can be raised for the first time at the trial as provided by Rule 41 (b), URCP). See discussion on pages 8-16 of Butchers original brief herein.

2. *That plaintiff was prejudiced in meeting that defense at the trial by Butchers not amending their answer to assert that defense, when plaintiff's answers to interrogatories supplied facts from which availability of that defense could have been learned.* Plaintiff has failed to point to any witness or evidence which it might have presented at the trial had Butchers asserted the defense four months earlier when plaintiff finally answered Butchers' interrogatories (over a year late). At the most plaintiff has speculated that since a person who formerly worked at plaintiff's bonding department was not available for the trial because he no longer worked for plaintiff, his testimony might have been favorable to plaintiff. No proffer of proof was made as to what evidence that person might have presented had he been called, or as to how it might have affected the trial of the past consideration issue. (Plaintiff's brief P. 21). Mills testified that several different people

worked on this bond, and that since plaintiff's Denver office retained copies of everything he did not keep his files even though he knew that a dispute had arisen concerning the bond. (R. 382, 384). There is no claim by plaintiff that the destroyed files of Mills would have been available for the trial had Butchers asserted the past consideration defense four months earlier (Mills only retained his files for three years — R. 383), or that the former employee of plaintiff would have been available for trial or would have been able to give helpful testimony on the vital question of past consideration had that defense been raised four months earlier. Under Rule 15(b), URCP, the burden was upon plaintiff to satisfy the court that the admission of evidence concerning past consideration would prejudice plaintiff in maintaining his action on the merits. Plaintiff not only failed to object to the admission of that evidence, but plaintiff itself introduced that evidence. Rule 15(b), URCP, further provides that the Court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence. Plaintiff did not move for a continuance to permit it to locate additional files or witnesses, but chose to stand on the record before the Court. A determination of the case on its merits within the meaning of Rule 15(b), URCP, requires a determination that Butchers were never legally bound to indemnify plaintiff because the Butcher indemnity agreement was not supported by any consideration.

Plaintiff claim that the 5½ year delay in bringing this matter to trial created prejudice which precludes

Butchers from then asserting the absence of consideration defense. As indicated on page 18 of Butchers' original brief, that delay resulted from plaintiff's failure to answer Butchers' interrogatories, which resulted in cancellation of four separate trial dates. (P. 19 of Butchers' brief). Plaintiff argues that the last cancellation was at the request of Butchers' counsel. (Plaintiff's brief P. 9-10). It is true that Butchers' counsel moved for a continuance of the trial scheduled Jan. 23, 1974, because plaintiff had finally filed it's answers to Butchers' interrogatories (after a delay of over a year in answering) on January 17, 1974, only five days before the scheduled trial date, leaving insufficient time to review the 28 page answer and to prepare for trial. Plaintiff cannot now blame Butchers for it's delay in bringing this matter to trial and then take advantage of it's own delay, so as to prejudice Butchers in asserting an absolute defense to plaintiff's claim, since Butchers first became aware of that defense when plaintiff introduced the bond and the indemnity agreement into evidence at the trial.

Plaintiff has simply not shown facts which would justify the court's refusal to permit Butchers to assert the defense of lack of consideration at the trial. See also discussion on pages 16-20 of Butchers original brief herein. The decision of the Court refusing to permit Butchers to assert the defense of past consideration is in error and should be reversed.

## CONCLUSION

Butchers' indemnity agreement is unenforceable for lack of consideration, having been executed for months after the bonds were issued by plaintiff. Plaintiff's unfounded claim that the bonds were issued by plaintiff in reliance upon an alleged oral agreement by Butchers to later sign an indemnity agreement is contrary to the undisputed evidence, including the testimony of plaintiff's agent Mills, who negotiated for the bonds.

Plaintiff's claim that Butchers should be precluded from asserting that they never were liable to plaintiff under the indemnity agreements, due to lack of consideration, because Butchers didn't plead that defense in their answer. Butchers did not discover the availability of that defense until plaintiff introduced the bond and indemnity agreement at the trial. Plaintiff claims that it was prejudiced in responding to that defense by the delay in asserting the defense, but failed to request a continuance in order to meet that defense as contemplated by Rule 15(b), URCP, and failed to point to or to make a proffer of evidence which it could have produced had Butchers discovered that defense and moved to amend their answer some four months earlier when plaintiff's answers to interrogatories disclosed dates from which the availability of that defense might have been learned. At most plaintiff has only speculated that evi-



dence favorable to plaintiff might have been available had it learned of the absence of consideration defense four months earlier. As an expert in the bonding business surely plaintiff was always aware that the Butchers indemnity agreement was not enforceable.

The evidence before the court establishes conclusively that Butchers (and particularly Mrs. Butcher) were never asked to sign an indemnity agreement until some four months after plaintiff delivered it's bonds without requesting or requiring an agreement to give an indemnity agreement from Butchers. Accordingly, the judgment should be vacated and the case dismissed as to Butchers, or should be remanded for a new trial on the issue of whether or not Butchers made an oral promise to sign an indemnity agreement to induce plaintiff to execute it's bond for the defendant Carnicero.

Respectfully submitted,

RONALD C. BARKER  
2870 South State Street  
Salt Lake City, Utah 84115  
Telephone 486-9636

*Attorney for  
Defendants-Appellants*